- JUDGMENT -

Before:

The Master of the Rolls
Lord Justice Richards
and
Lord Justice Christopher Clarke

LORD JUSTICE CHRISTOPHER CLARKE:

1. These appeals from two judgments in the Commercial Court concern the extent to which a c.i.f. seller was, under the terms of the relevant contract, liable for duties on the import of biodiesel into Romania.

The facts

2. On 19 August 2009 Bioversel Trading Inc ("Bioversel") sold to Vector Energy AG ("Vector") 2000 m.t. of biodiesel f.o.b. Quebec City. It was a term of the contract that the diesel should be of Canadian origin. On 19 September 2009 Vector nominated the vessel "Clipper Klara" to take the cargo.

3. On 5 October 2009 Vector agreed to sell to Petrom SA ("Petrom") 1,000 tonnes of biodiesel +/- 5% in seller's option ("the diesel") c.i.f. Constanza. On the same day OMV Supply and Trading AG ("OMV") agreed to buy the diesel from Petrom on the same terms. Petrom and OMV are part of the same group of companies.

4. On 8 October 2009 the Vector/Petrom contract was novated in favour of OMV as buyer. The cargo was discharged on the same day. On or about 9 October 2009 Petrom made a declaration to Romanian Customs that the diesel was of Canadian origin and the diesel was cleared for entry on that basis.

5. On 13 October 2009 OMV notified Vector that it had paid import duties of US $ 58,910.79. On the same day Vector sent to OMV copies of (i) a certificate of origin; (ii) an invoice and (iii) an endorsed bill of lading. It had sent the certificate of origin, which it had received from Bioversel, previously – on 2 October 2012. The certificate declared Canada to be the country of origin. The invoice was for $ 862,695.43, being the price of the diesel of $ 921,606.22 less $ 58,910.79 duty.

6. For some time thereafter, so far as OMV was concerned, nothing happened. But, unknown to OMV, between August 2010 and April 2012 OLAF, the European Commission's anti-fraud office, was investigating the origin of the diesel. On 23 May 2012 OLAF reported to the Romanian Customs that the diesel was of US origin. Goods of US origin attracted antidumping and countervailing duties under Council Regulations Nos 193 and 194/2009 and 598 and 599/2009, which were applicable at the time of customs clearance in October 2009.

7. So it was that on 2 August 2012 Romanian Customs demanded of Petrom:

a) ROM 1,714,182 (being ROM 721,363.98 antidumping tax and ROM 992,818.02 compensation tax), which amounted to US $ 595,335.41; and
b) ROM 1,251,010,02 by way of interest and penalties which amounted to US $ 434,475.78 making US $ 1,029,811.19 in all. Petrom paid these amounts.

The terms of the contract

8. The contract between Vector and Petrom/OMV provided that what was being sold was a non-segregated part cargo of 1,000 metric tonnes plus/minus 5 pct in seller's option: clause 4. Delivery was to be c.i.f. one safe port/one safe berth Constanza, Romania during the period 4-10 October 2009 delivered by m/t Clipper Kalara accepted by Buyer: clause 5.

9. Clause 6 provided:

"*6. Price*

In US dollars per metric tonne, the price CIF Constanza will be the average of the high and low quotations for ULSD 10 ppm as published by Platts under the heading FOB Med (Italy) plus a premium of $ 340 per mt for the three quotations published immediately after the NOR date at disport Constanza, Romania. Any published Platts corrections to apply The Final Price shall be rounded off to three decimal places with rounding up where the next decimal place is five or greater. All fees such as but not limited to customs duties and penalties incurred by non EU origin , in force at the time of cargo customs clearance will be deducted from invoice value .

Buyer will notify seller of such fees and send supporting documents latest by the first business day after vessels completion of discharge and seller will issue the final invoice within five business days from such notification."

10. Clause 7 provided:

"*7. Payment*

Payment for the product shall be made in immediately available (same day) funds by telegraphic transfer to the bank and the account designated by seller prior to the closing time of sellers bank, ten (10) calendar days after NOR (NOR date being day zero)

Payment shall be made by buyer without discount, withholding, setoff, counterclaim or other deduction (s) against presentation of Seller's invoice and usual shipping documents applicable for a part cargo… or, in the case of temporary unavailable documents, against seller's invoice (fax acceptable) and seller's bank countersigned letter of indemnity in a format and from a bank acceptable to buyer. Seller shall forward invoice and documents or bank countersigned LOI at least three (3) Swiss Banking days prior to the date and provide buyer with a copy of the bill of lading and loadport certificate of quality.

……..

The Seller will issue a proforma invoice to be used by the buyer for customs, the price for the pro forma invoice is to be based on the relevant Platts quotation on the day of NOR. (In case of non – publication, then the previous quotation to apply) and the quantity will be the one that is determined in clause 4. Quantity.

…."

11. Vector was subsequently renamed Kazmunaygaz Trading AG ("Kazmunaygaz"), which is the trading arm of the state owned oil and gas company of Kazakhstan. Vector and Kazmunaygaz are part of the same group of companies.

OMV's claim

12. OMV, the buyer, claimed that it was entitled to recover the $ 1,029,973, 95 from Kazmunaygaz. It did so on a number of grounds, but primarily under clause 6 of the contract. Kazmunaygaz, the seller, contends that it is not liable to pay any part of that sum. On 17 May 2013 Colin Edelman QC, sitting as a Deputy Judge of the High Court, gave judgment in favour of OMV for $ 862,695.43 (together with interest) and gave Kazmunaygaz permission to defend as to the balance of the $ 1,029,973, 95. On 8 November 2013 HH Judge Mackie QC determined, as a preliminary issue, that Kazmunaygaz was not entitled to recover the balance under clause 6. OMV appeals the latter judgment insofar as it denied them recovery of the balance and Kazmunaygaz appeals the former insofar as it required them to pay anything at all.

13. A c.i.f. seller is not generally liable for any import duties on the cargo. But a c.i.f. contract may provide that it shall be e.g. if the contract is for delivery, duty paid.

14. OMV submits that the contract does so provide. Clause 6, it submits, makes clear that "*customs duties and penalties incurred by non EU origin*" (I infer that something like "by reason of" has been omitted before "*non EU*") are for the account of the seller and fall to be paid by it. Moreover what is to be paid are the duties "*in force at the time of cargo customs clearance*". It is, therefore, no answer to the seller's claim that the Romanian authorities only discovered the origin of the goods several years after import. It is common ground that the antidumping and compensation taxes fall within the phrase "*customs duties and penalties*". There was an appeal against their imposition but it was unsuccessful. The sums exacted were, therefore, those in force at the time of clearance. Noticeably the clause does not refer to sums "imposed" at that time. The seller's liability is not limited because the clause refers to deduction. Liability in respect of the duties is clear and is not ousted by that phraseology. In this context a deduction which produces a negative figure simply signifies that the sellers must pay the excess.

15. Kazmunaygaz contends that clause 6 is a tightly drawn clause which is intended to operate on a once and for all basis at the time of discharge. In order to recover any sum by way of fees the buyer must notify the seller of such fees and send supporting documents at the latest by the first business day after the vessel's completion of discharge. If the buyer does not do so it cannot claim to recover the fees at some later date. If it does so and a deduction is made from the invoice value, the process is exhausted. The buyer cannot claim to deduct again. The clause does not contemplate that the seller, having reimbursed the buyer the amount notified by the buyer at the time, can be called upon to make a further payment years later. Even if it could be required to do so, the limit would have to be the amount of the invoice. Anything else would not be a deduction from the price.

Conclusion

16. In my judgement the parties cannot have intended that the entitlement of the buyer to recover fees was dependent on it having notified the seller of such fees and sent supporting documents no later that the first business day after completion of discharge, or that no further adjustment to the price was possible if the amount that should be deducted turned out to be greater than was first thought. I say that for a number of reasons.

17. First, that would mean that the buyer would forfeit any entitlement if, for whatever reason, it did not fulfil that obligation within that very limited time. It would do so even if its failure was through no fault of its own e.g. because it was impossible to work out the fees or to produce supporting documents on account of delays or difficulties for which the Romanian authorities were responsible, or because an employee or agent fell ill, or because of communication difficulties. The combination of a very short time limit and a drastic consequence in the event of noncompliance lacks any commercial sense. I note that the seller did not in fact rely on the fact that the buyer's notification was given on 13 October 2009, five days after completion of discharge.

18. Second, if time is of the essence in respect of the buyer's notification of fees and supply of documents, but not in respect of the seller's final invoice the contract is grossly unfair. If it applies to both so that the seller cannot recover any payment against its final invoice if the invoice is a day late, the result borders on the absurd.

19. Third, the parties did not in clause 6 use language making clear that timely compliance was a condition precedent to liability although they did do so elsewhere.

20. Thus clause 10, the Demurrage clause, provided that:

> "*In no event shall the buyer be liable for demurrage unless the demurrage claim has been submitted in writing within 90 days of the date of delivery, stating in reasonable detail the specific facts upon which the claim is based provided that any supporting documentation which is not at that time available to the seller shall be submitted to the buyer within 110 days of the date of disconnection of hoses……If the seller fails to provide such documentation within the aforesaid limits then any liability of the buyer for demurrage shall be deemed not to have been waived*"
>
> Clause 20 provides:
>
> *"20 Claims for quantity and quality. Any claims relating to the quantity and quality of the product must be fully documented and presented by the buyer to the seller within 90 days after completion of discharge (COD date to count as day zero)for the subject cargo, failing which such claims shall be deemed to have been waived absolutely and shall be forever barred*"

21. Last, a construction that leaves no room whatever for the correction of error, particularly an error consistent with a certificate of origin provided by the seller (even if it was not bound to do so), would make little commercial sense and is not mandated by the language used. What the words used undoubtedly require is a deduction from the invoice value (and thus the price to be claimed) of "*all fees in force ... at the time of cargo customs clearance*".

22. In those circumstances the provision for notification of fees and supporting documents by the first business day after completion of discharge cannot be regarded as meaning that failure to do so in the time specified is fatal. Accordingly the amount of the fees

fell to be deducted from the price and OMV is entitled to recover so much of the price as, on that basis, represents an over payment i.e. $ 862,695.43.

23. OMV is not, however, entitled to recover any more. I do not accept Mr Happé's submission that clause 6 makes clear that the seller is to pay the fees whatever they may be even if they exceed the price. If the parties had intended that to be so they would need to have used clear language to that effect. Instead they provided for a deduction of fees from the price, no doubt contemplating that the fees would always be less. Having used that language, they cannot be taken to have agreed that, if the fees exceeded the price, the seller would pay the excess, especially in a clause whose function is to determine how much the buyer pays the seller. Whilst a negative which implies a positive (as in negative interest rates) is not unknown, it is in this context a contradiction in terms. In a contract of sale the price is what the buyer pays the seller. To require the reverse would need very clear wording.

24. In short, in my judgment neither of the judges below was in error. For the reasons set out above, which are essentially the same as theirs, I would dismiss both appeals.

25. One of the grounds of appeal which Kazmunaygaz sought to argue was that, even if it was liable in respect of some part of the price, a distinction was to be made between the antidumping tax and compensation tax on the one hand and the interest and penalty on the other. Lewison LJ refused permission to appeal on this ground on the basis that OMV claimed that this was a new point. He ordered that any renewed application should be made on notice to them. In the event no such application was made. Mr Saunders suggested that the point could be resurrected by the respondents' notice in respect of OMV's appeal, in which Kazmunaygaz claimed that the sum which OMV seeks to recover did not constitute fees in force at the time of cargo customs clearance. To allow Kazmunaygaz to do so by that route would be an abuse of the system. The point was not pursued before us. In those circumstances I say no more about it.

LORD JUSTICE RICHARDS

26. I agree.

THE MASTER OF THE ROLLS

27. I agree.